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No. 05-

IN THE

Supreme Court of the United States

JOHN GATES, *et al.*,
Petitioners,

v.

JANICE AKINS, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether *Hope v. Pelzer*, 536 U.S. 730 (2002), changes this Court's qualified immunity jurisprudence set forth in *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Saucier v. Katz*, 533 U.S. 194 (2001) such that it strips public officials of their entitlement to qualified immunity in factually and legally complex First Amendment retaliation cases simply because the official was on notice that the employees' "speech as whistleblowers was protected," *see Akins v. Fulton County*, 420 F.3d 1293, 1308 (11th Cir. 2005), even when the District Court and the Eleventh Circuit acknowledge the complexity of the legal issues and the Court of Appeals remands the case to the District Court with instructions that a jury should decide the legal question regarding the main thrust of the speech.

II. Whether the Eleventh Circuit's decision to strip Petitioner of his entitlement to qualified immunity in a factually and legally complex First Amendment retaliation case comports with this Court's qualified immunity jurisprudence, which instead dictates that qualified immunity should be preserved when the law is not clearly established in a particularized and relevant sense.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed:

Janice Akins,
Appellant Below.

Debra Blount,
Appellant Below.

Natalie Revell,
Appellant Below.

John Gates,
Appellee Below.

Pursuant to Rule 29.6, Petitioners state that the named Petitioners do not have any corporate parent, subsidiary, or affiliate that is publicly held.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

John Gates, ("Petitioner"), former Director of the Fulton County Purchasing Department requests that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit which stripped him of his entitlement to qualified immunity in a factually and legally complex First Amendment retaliation case centering on mixed public-private speech allegedly leading to Janice Akins and Debra Blount ("Respondents") being constructively discharged from their employment.[1] As reflected in two District Court Orders and the Eleventh

[1] The Eleventh Circuit did not strip Petitioner of his entitlement to qualified immunity with respect to Natalie Revell's claim of First Amendment retaliation, holding that "neither this Circuit nor the Supreme Court has yet to recognize the claim of 'constructive transfer' as an adverse employment action." *Akins v. Fulton County*, 420 F.3d 1293, 1306 (11th Cir. 2005).

Circuit Opinion prompting this Petition, the facts and the law surrounding this case are difficult to analyze. Indeed, the Eleventh Circuit itself was unable to determine the important question of law at issue, *i.e.*, whether the "main thrust" of the speech at issue in this case was for private gain or public concern. *Akins v. Fulton County*, 420 F.3d 1293, 1304 (11th Cir. 2005) ("Due to the nature of the meeting and the status of the official, ***a reasonable jury could conclude*** that the 'main thrust' of the meeting was not for private gain, but rather of public concern.") (emphasis supplied). Thus, the question of law, whether Respondents' speech is protected, must now be determined by a jury. If after a lengthy trial the jury decides that the speech is not protected, only then will Gates' qualified immunity be reinstated. *See id.* at 1308 ("I would like to emphasize that there is a disputed question of fact as to whether the 'main thrust' of the August 27, 1998 meeting was to discuss bidding irregularities, as Plaintiffs allege, or general work environment concerns, as Commissioner Darnell claims. This issue is best resolved by a jury, and not on a motion for summary judgment.") (Black, J., concurring).

The Eleventh Circuit thus concluded that the threshold legal question of whether the employee's speech may be fairly characterized as constituting speech on a matter of public concern, a question of law, *see Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), as modified by *Connick v. Myers*, 461 U.S. 138 (1983), should be determined by a jury. The Eleventh Circuit arrived at this unusual First Amendment retaliation result by reexamining the District Court's grant of qualified immunity to Petitioner through the lens of *Hope v. Pelzer*, 536 U.S. 730 (2002). Thus, the denial of Petitioner's entitlement to qualified immunity in this case based on purportedly clearly established law in the First Amendment retaliation and constructive discharge contexts, and leaving that decision to a jury, decides an important federal question in a way that conflicts with relevant decisions of this Court which define the contours of the doctrine of qualified

immunity. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'") (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) and *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

The most important question in this petition is the Eleventh Circuit's reliance on a generalized principal of First Amendment law, that Respondents' "speech as whistleblowers was protected by the First Amendment," which directly contradicts this Court's instruction in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Thus, "the relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("As we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.") (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). Moreover, *Saucier* established that the relevant question is not whether Petitioner's actions were expressly authorized by existing law, but whether they were clearly *forbidden*—i.e., whether a reasonable official would have known the actions in question were illegal. *Saucier* at 202. Given the factually and legally complex First Amendment retaliation issues centering on mixed public-private speech that Petitioner in this case must have discerned in August 1998 when he allegedly constructively discharged Respondents, it was not clear to Petitioner in this case that his conduct was unlawful. As this issue must now be decided by a

jury, it still is not clear that Petitioner's conduct was unlawful. Therefore, based on *Anderson* and *Saucier*, Petitioner's entitlement to qualified immunity should be restored.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, appended hereto at Pet. App. 1a, is reported at 420 F.3d 1293 (11th Cir. 2005). The order of the district court denying Respondents' Motion for Reconsideration, appended hereto at Pet. App. 23a, is not reported. The order of the district court granting Petitioner's Motion for Summary Judgment, appended hereto at Pet. App. 58a, is not reported.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered its order and judgment on August 17, 2005. *See* Pet. App. 1a. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provision set forth below:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

This case involves the following statutory provision, the pertinent portions of which are set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation